In the Matter of Michael Larino
CSC Docket No. 2011-1195
OAL Docket No. CSR 9890-10
(Civil Service Commission, decided May 18, 2011)

The appeal of Michael Larino, a Fire Fighter with the City of Bayonne, of his removal effective March 2, 2010, on charges, was heard by Administrative Law Judge Jeffrey A. Gerson (ALJ), who rendered his initial decision on February 15, 2011. Exceptions were filed on behalf of the appellant and cross exceptions were filed on behalf of the appointing authority.

Having considered the record and the ALJ's attached initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on May 4, 2011, accepted and adopted the Findings of Fact and Conclusions as contained in the initial decision and the ALJ's recommendation to uphold the appellant's removal.

DISCUSSION

The appellant was charged with incompetency, inefficiency, failure to perform duties, insubordination, conduct unbecoming a public employee, neglect of duty, and other sufficient cause. Specifically, the appointing authority asserted that the appellant tested positive for marijuana and benzodiazepines.[1] Upon the appellant's appeal, the matter was transmitted to the Office of Administrative Law (OAL) for a hearing as a contested case.

Initially, the ALJ set forth that on March 2, 2010, Fire Captain Jack Lopez observed that the appellant seemed extremely tired and was falling asleep. Lopez was concerned about the appellant's condition and questioned him as to whether he was okay. The appellant advised Lopez that he had not slept for two days and that he was not feeling well. Lopez noted that the appellant not only seemed totally exhausted but also had difficulty talking and getting words out. Lopez described the appellant's eyes as though they looked as if they were going to "pop out of his head" and opined that he did not think the appellant was "fit to ride." Although Lopez recommended to Battalion Fire Chief Robert Ballance that he be sent home, the appellant could not be sent home because the roster had already been completed for the day. Lopez suggested that the appellant go home sick, but the appellant indicated that he was on the "bad boy list," which meant that he would have

[1] Benzodiazepines is more commonly known as Valium or Librium.

to produce a doctor's note each time he was out sick. Lopez and Ballance notified Deputy Fire Chief Albert Hurley about the appellant's condition which resulted in Hurley meeting with the appellant in the presence of both. Hurley testified that he observed that the appellant walked slowly and appeared groggy, his speech was inaudible, his tongue was hanging out, and his eyes were dilated. Based on these observations, Hurley believed there was a reasonable suspicion of possible drug use and he sent the appellant for a fitness for duty examination.

Gerard Rizzo, Laboratory Director, Hudson Medical Laboratory, testified that after the appellant's urine sample was collected, it was forwarded to MedTox Laboratories (MedTox) in Minnesota. Although Rizzo did not personally make observations of any of the procedures with respect to the collection of the urine sample, he did authenticate all of the documentation with respect to the drawing and handling of the urine sample. Rizzo also confirmed that the normal laboratory procedure was to split the urine sample, sending one portion on for urine analysis and retaining the split-portion in the event of difficulty with the sample sent to the lab. The sample forwarded to MedTox tested positive for marijuana and benzodiazepines.

The ALJ found little merit in the appellant's arguments that the appointing authority failed to establish that there was reasonable cause to test him for drugs and/or alcohol or that neither Lopez nor Hurley had sufficient training to differentiate drugs/alcohol-induced symptoms from those that would appear from unrelated causes. In this regard, the ALJ noted that the symptoms exhibited by the appellant could very well have been either those of a drug-induced variety or from extreme exhaustion accompanied by some type of disease. Although there may have been two explanations for the symptomatology exhibited by the appellant, the ALJ concluded that a reasonable suspicion of drug or alcohol use existed and that testing would resolve the issue.

The ALJ also determined that the documentation offered by Rizzo confirmed the procedures carried out by both the drawing lab and the testing lab. Although Rizzo made no personal observation of what occurred on the date in question, the ALJ found that he did substantiate the methods of the lab which were fortified by the documentation he presented and there was no testimony offered to refute Rizzo's contention that the results of the testing were accurate. Further, the ALJ indicated that the failure of the lab to split the urine sample was of little consequence, since it was quite simply a lab

procedure not mandated either by the appointing authority or the Attorney General's Office. As such, he concluded that the failure of the lab to follow one of its own policies was not "fatal" to the lab result. Therefore, in the absence of any evidence to refute the documentation and testimony of Rizzo, the ALJ determined that the documentary evidence presented overcame the contention that the appointing authority failed to meet the standard of a preponderance of the credible evidence.

With respect to the assertion that the appointing authority and the appellant's union entered into an agreement regarding a drug and alcohol policy, the ALJ found that a proposed policy agreement of 2007 was not executed by all the parties and, therefore, was ineffective and had no consequence in this matter. Regarding the appellant's contention that termination was too harsh a penalty and that he should have been accorded the opportunity to enter into a "Last Chance Agreement" as the appointing authority had done on two prior occasions,[2] the ALJ indicated that he could not conclude that termination was too harsh, even though it was not legally mandated. The ALJ noted that a zero tolerance policy does not allow for Last Chance Agreements to some but not for others and that he did not have the foundation for a balancing of previous determinations with the factual circumstances presented in this matter. Therefore, the ALJ upheld the appellant's removal.

In his exceptions, the appellant argues that there is no evidence in the record to support that Hurley believed that there was a reasonable suspicion of possible drug use based on his observations and that he sent the appellant for a fitness for duty examination. Rather, he states that Hurley reported his observations to Fire Chief Gregory Rogers, who, in conjunction with the Law Department, determined there was a reasonable cause to test him for drugs and alcohol. He also asserts that the ALJ failed to indicate that MedTox did not follow its own normal procedures of splitting the urine sample in this case and did not acquire a second sample to allow him the opportunity for an independent test, and that Rizzo testified that this was in fact a "fatal" error. The appellant states that a final drug and alcohol policy was in fact negotiated which would require progressive discipline and prohibit the appointing authority from removing him. Similar to the situation in *In the Matter of Daniel Cahill*, 245 *N.J. Super.* 397 (App. Div. 1991), the appellant argues that the appointing authority has a duty to reasonably accommodate him under its workplace policies and regulations regarding drug and alcohol use since he is protected as a handicapped person. In this regard, he

[2] The ALJ considered the fact that the appellant had successfully participated in a rehabilitation program funded by his union and had been drug free for some time.

maintains that he requested a reasonable accommodation in the form of entry into a treatment facility and states that the appointing authority specifically denied him that opportunity or the opportunity to enter into a Last Chance Agreement. He also contends that he was denied due process of law as the appointing authority did not meet its burden to prove that the procedures used by MedTox were followed in his testing. Additionally, the appellant maintains that the ALJ improperly omitted all facts regarding the Last Chance Agreements provided to other firefighters in similar factual circumstances even though the record was replete with evidence of these agreements. Moreover, he asserts that he presented factual evidence that the appointing authority does not have a zero tolerance policy and that he was treated differently than other firefighters under the same circumstances. For these reasons, the appellant maintains that the charges against him should be dismissed or, if there was a reasonable suspicion to test him and that the results were valid, that he should be treated as a "first offender" under the negotiated policy and be subjected to the punishment set forth therein of up to a 30-day suspension and a referral to the employee assistance program. In the alternative, if there was no enforceable negotiated policy, the appellant maintains that he should be afforded a "Last Chance Agreement" under the same terms as given to two previous Fire Fighters employed by the appointing authority.

In response, the appointing authority presents that it had a reasonable suspicion to order the appellant to undergo drug and alcohol testing based on the observations of Hurley, Ballance, and Lopez. Further, there were no factual errors with regard to the collection of the appellant's urine sample as the documentation offered by Rizzo was marked into evidence confirming the procedures carried out by both the drawing lab and the testing lab. Moreover, Rizzo never testified that the lack of a split sample was a "fatal" error. The appointing authority also states that it never reached an agreement with the appellant's union on a drug and alcohol policy as the purported agreement was never executed or ratified by either party and the program was never formally adopted by the City Council or codified in any policy manual, employee handbook or department general order. Additionally, the appointing authority states that it has not established a past practice of offering Last Chance Agreements.

Concerning the issue of accommodation, the appointing authority presents that the record does not evidence that the appellant actually requested a reasonable accommodation for any drug and/or alcohol problem. Moreover, it asserts that the appellant was not entitled to a reasonable accommodation under its Workplace Policies and Regulations. More

importantly, even if the appellant was eligible to participate in a rehabilitation or treatment program pursuant to its workplace policies and regulations, the appointing authority asserts that it was not obligated to accommodate him. While the appellant is correct that the Appellate Division in *Cahill* ruled that an individual addicted to drugs or alcohol is a "handicapped person whose condition falls within the Law Against Discrimination (LAD)," it also explicitly noted that the LAD does not prohibit discrimination against a handicapped person where the nature and the extent of the handicap reasonably precludes the performance of the particular employment. The appointing authority also maintains that the appellant was not denied due process of law, that termination is the appropriate penalty, and that he was not entitled to a Last Chance Agreement.

Upon its *de novo* review of the record, the Commission agrees with the ALJ's determination and the decision to uphold the appellant's removal.

The appellant argues that the ALJ improperly and erroneously concluded that there was "reasonable suspicion" to test him even though Lopez and Hurley were unclear or unsure of the genesis of his physical condition and the ALJ conceded that his symptoms could be subject to more than one interpretation. The Commission disagrees. Based on the observations of three supervisory fire officers, the appellant appeared to be extremely tired and was falling asleep, seemed totally exhausted and had difficulty talking and getting words out, walked slowly, appeared groggy and had his tongue hanging out. His eyes were also dilated. As noted by the ALJ, there need not be an "expert parsing of the symptoms to give rise to a reasonable suspicion of drug use for if symptomatology being exhibited by an individual is subject to two interpretations, it is testing that will resolve the issue." Therefore, the Commission does not find the appellant's exceptions persuasive that the appointing authority did not have a reasonable suspicion to test him.

Further, there is no evidence that the appellant was denied due process of law or that the appointing authority failed to meet its burden to prove that procedures used by MedTox were followed in his drug testing. In this regard, even though Rizzo did not oversee the collection of the appellant's sample, he is the Director of the Laboratory that took the sample. Rizzo also substantiated the methods of the laboratory, which was supplemented by the documentation he submitted. *See e.g., In the Matter of Michael Picariello* (CSC, decided February 2, 2011). It also cannot be ignored that there was no testimony offered to refute Rizzo's contention that the results of the testing were accurate. Moreover, although the appellant asserts that he was denied due process because of the failure to collect a split sample, this failure is not

"fatal" where, as here, there is absolutely no evidence that the results of the appellant's drug test were inaccurate. *See e.g., In the Matter of John Kelly* (MSB, decided May 24, 2006).

The appellant asserts that his condition qualifies him as a handicapped person in accordance with *N.J.S.A.* 10:5-5(q) of the LAD which, similar to the situation in *Cahill, supra,* requires the appointing authority to provide him a reasonable accommodation. In *Cahill,* the court acknowledged that addiction, habituation or dependency which results from use of one drug or a combination of drugs renders a person handicapped. However, the court emphasized that *N.J.S.A.* 10:5-4.1 prohibits discrimination against a handicapped person "unless the nature and the extent of the handicap reasonably precludes the performance of the particular employment." It also underscored that Cahill was a Fire Fighter and that:

> the negligent or improper performance of that function can result in serious harm to persons and property ... The nature of Cahill's job duties satisfies the city's burden of proving with a reasonable certainty that his handicap would probably cause injury to himself or to others. *Cahill* at 400-401.

The court in *Cahill* also noted that a firefighter is subject to being called when needed, anytime of the day or night, and that a firefighter under the influence of drugs cannot do the job. While the court in *Cahill* did consider that an employer, where feasible, should afford an opportunity for rehabilitation to an employee handicapped by substance abuse, it did not mandate that a firefighter should not be removed for a first positive drug test. In this regard, the court stated that "refusal to continue employment of a handicapped person is lawful where employment in a particular position would be hazardous to that individual or other." *Id.* The fact that *Cahill* was provided with a "second chance" only demonstrates that such agreements and policies exist, but it does not require that a second chance be given when such policies or agreements did not exist in the first place. Significantly, in this case, there is no evidence in the record that the appellant requested an accommodation or sought assistance of any kind for his asserted handicap prior to his drug test that was based on the appointing authority's reasonable suspicion.

Additionally, it is evident that the drug and alcohol policy, which would have provided for progressive discipline or a second chance, was never executed or ratified by either party and the program was never formally adopted by the City. Therefore, the Commission agrees that it was of no consequence in this matter. Finally, the appellant's argument that two other firefighters were provided second chances for incidents that occurred in 2004

do not establish a pattern of past practice. The situation involving the appellant occurred six years later in 2010 and it is clear that there is no current policy to provide second chance agreements.

In determining the proper penalty, the Commission's review is *de novo*. In addition to its consideration of the seriousness of the underlying incident in determining the proper penalty, the Commission also utilizes, when appropriate, the concept of progressive discipline. *West New York v. Bock*, 38 *N.J.* 500 (1962). In determining the propriety of the penalty, several factors must be considered, including the nature of the appellant's offense, the concept of progressive discipline, and the employee's prior record. *George v. North Princeton Developmental Center*, 96 *N.J.A.R. 2d* (CSV) 463. However, it is well established that where the underlying conduct is of an egregious nature, the imposition of a penalty up to and including removal is appropriate, regardless of an individual's disciplinary history. *See Henry v. Rahway State Prison*, 81 *N.J.* 571 (1980). It is settled that the principle of progressive discipline is not a "fixed and immutable rule to be followed without question." Rather, it is recognized that some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. *See Carter v. Bordentown*, 191 *N.J.* 474 (2007).

The Commission has long recognized that Fire Fighters hold very unique positions, and any disregard for the law is unacceptable in a Fire Fighter who operates in the context of a paramilitary organization. *See In the Matter of Bart Giaconia* (MSB, decided February 22, 2006); *In the Matter of James Alessio* (MSB, decided March 9, 1999). Fire Fighters "are not only entrusted with the duty to fight fires; they must also be able to work with the general public and other municipal employees, especially police officers." *Karins v. City of Atlantic City*, 152 *N.J.* 532, 552 (1998). This is especially true where, as here, the appellant is a Fire Fighter who has tested positive for drug use. Indeed, as noted in *In the Matter of Russell Strother* (MSB, decided December 6, 2006), any use of an illegal drug constitutes a violation of the law and of a Fire Fighter's duty to exhibit conduct, both on and off duty, that is commensurate with his position. Although the appellant in *Strother* was appealing an equivalent of a six-month suspension for a positive drug test for marijuana, the former Merit System Board emphasized that if it were not constrained by the provisions of *N.J.S.A.* 11A:2-19, which prohibited it from substituting removal for a lesser penalty, it would have been inclined to impose removal in that matter. Therefore, the appellant's offense is sufficiently egregious to warrant his removal. Accordingly, the Commission concludes that the penalty imposed by the appointing authority is neither unduly harsh nor disproportionate to the offense and should be upheld.

ORDER

The Civil Service Commission finds that the action of the appointing authority in imposing a removal was appropriate. Therefore, the Commission affirms that action and dismisses the appeal of Michael Larino.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.